

Board of Alien Labor Certification Appeals
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

DATE: April 3, 1997

CASE NO: 95-INA-515

In the Matter of:

AIR TIGER EXPRESS (FLORIDA) INC.
Employer,

On Behalf of:

YA LUN CHEN,
Alien

Appearance: L. S. Rifkin, Esq., Miami, Florida.

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Ya Lun Chen (Alien), by Air Tiger Express (Florida), Inc., (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at Atlanta, Georgia, the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.¹

Statutory authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

the alien is to perform such labor;² and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

Statement of the case. On September 14, 1994, the Employer filed an application for labor certification to enable the Alien, who is a national of Taiwan, to fill the employment opportunity position of "Shipping and Transport Feasibility Consultant" in the Employer's International Air and Cargo Transport business at Miami, Florida. The duties of the position offered were described as follows in Form ETA 750:

Will provide advice, direction, and counsel to the general management concerning the options, risks, and benefits of establishing branch offices in Pacific Rim countries whose actual and projected importation and exportation volumes impact on the financial situation of North, Central and South America. Will direct the analysis of statistical and financial data gained through financial and econometric sampling techniques, regarding cost factors, personnel expenses, facility leasing fees and ultimate profitability margins, based on various rates of exchange, currency fluctuation, and the economic and financial stability of individual countries, as well as the regional outlook of the Pacific Rim in general.

AF 87. The salary offered was \$650 per forty hour week with no overtime for work from 9:00 A.M. to 5:00 P.M. The local prevailing wage is \$573. The Alien's Immediate Supervisor will be the Comptroller, and the Alien will supervise two employees. The educational requirement was a baccalaureate degree in Finance, with experience of two years in the Job Offered or in the Related Occupation of Finance Consultant. The Other Special Requirements for the position are that the worker "Must hold a Bachelor's Degree, with major field of study in Finance, and two years of experience as a Shipping and Transport Feasibility Consultant or two years of experience as a Finance Consultant or a Master of Business Administration Degree with a core of courses in Finance." AF 86. The position is similar to the Alien's work in his present job with the Employer. AF 164-165. The CO

²Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

classified the position described in the Employer's application as an "Economist" under Occupational Code No. 050.067-010.³ The above-noted prevailing wage was for work in this classification.

Alien's qualifications. In February 1993 the Alien graduated from Baruch College in New York, New York, with a Master's degree in Business Administration. His application establishes that he was employed in the position at issue under the title "Finance Consultant" from July 1993 to the date of application. His representations confirm that he acquired special qualifications in this position while working for the Employer on this job, as there is no evidence of record to the contrary. AF 164-164A.

Notice of Finding (NOF). Although the resumes of fourteen applicants were referred for this position by the Job Service of Florida, no U. S. workers were hired. On February 16, 1995, the CO advised the Employer in the NOF that certification would be denied on the record as it then stood, subject to rebuttal on or before March 23, 1995. AF 66-70.⁴

(1) Citing 20 CFR § 656.21(c)(8), the CO noted that the Employer must document that the job at issue is clearly open to any qualified U. S. worker. Because of Employer's actions the CO found that it did not make a good faith recruitment effort and that this job opportunity is not open to qualified, available and willing U. S. workers. The letter Employer sent to all U. S. candidates for this job had the effect of further discouraging applicants from pursuing the position, since the Employer already had received their resumes. By this form letter the Employer

³DOT Classification No. 050.067-010. **Economist** (profess. & Kin.) alternate titles: economic analyst: Plans, designs, and conducts research to aid in interpretation of economic relationships and in solution of problems arising from production and distribution of goods and services: Studies economic and statistical data in area of specialization, such as finance, labor, or agriculture. Devises methods and procedures for collecting and processing data, utilizing knowledge of available sources of data and various econometric and sampling techniques. Compiles data relating to research area, such as employment, productivity, and wages and hours. Reviews and analyzes economic data in order to prepare reports detailing results of investigation, and to stay abreast of economic changes. Organizes data into report format and arranges for preparation of graphic illustrations of research findings. Formulates recommendations, policies, or plans to aid in market interpretation or solution of economic problems, such as recommending changes in methods of agricultural financing, domestic and international monetary policies, or policies that regulate investment and transfer of capital. May supervise and assign work to staff. May testify at regulatory or legislative hearings to present recommendations. May specialize in specific economic area or commodity and be designated Agricultural Economist (profess. & kin.); Commodity-Industry Analyst; (profess. & kin.); Financial Economist (profess. & kin.); Industrial Economist (profess. & kin.); International-Trade Economist (profess. & kin.); Labor Economist (profess. & kin.); Price Economist (profess. & kin.); Tax Economist (profess. & kin.).

⁴The date for filing Rebuttal materials later was extended to April 21, 1995, at Employer's request.

required the candidates to bring to the interview the following:

a U. S. passport, a Certificate of U. S. citizenship, a Certificate of Naturalization, an unexpired foreign passport with the I-551 stamp or attached INS form I-940 indicating unexpired employment authorization, an alien registration receipt card with photograph, an unexpired Temporary Resident Card, an unexpired employment authorization card, an unexpired Re-entry Permit, an unexpired Refugee Travel Document, or an unexpired employment authorization document issued by the INS which contains a photograph.

Employer's letter continued,

[S]ince the position requires a university degree, at the time of the interview, we will require that you present a certified copy of your university academic transcript. If your academic credentials are granted by a university that is not a United States university, you must provide a certified copy of an evaluation of your academic credentials by an approved academic evaluation service. Also, at the time of the interview, we will require that you present letters of reference from employers with regard to any position in the industry related to the position of Shipping and Transport Feasibility Consultant. These letters should include your job title, duties, dates (month/year) of employment, and the number of hours per week that you have worked or are presently working, or similar documentation whereby we can verify your professional work experience.

See AF 75-76. As a consequence of Employer's letter, said the CO, four U. S. workers did not respond and thus were eliminated from competition for this job. The CO required the Employer to demonstrate that it had made a good faith effort to test the labor market, and that the job opportunity is clearly open to qualified and available U. S. workers. AF 69-70.

(2) The Employer advertised the job as "Shipping & Transport Feasibility Consultant," even though the DOT classified this position as "Economist," a title widely used in the area of intended employment. It was the CO's judgement that the title chosen by the Employer was misleading and had a "chilling effect" on the recruitment of U. S. workers. AF 69. Citing 20 CFR §§ 656.21(g)(1) through (9), the CO explained that the Employer should have used the titles, "Economist," "Economic Analyst," or "Financial Economist" that are designated for these duties in the DOT. The CO required the Employer to demonstrate that it had made a good faith effort to recruit for this position in the labor market or, in the alternative, to readvertise the job with the assistance of the Job Service of Florida. AF 70.

Rebuttal. On April 21, 1995, the Employer transmitted its response to the NOF, which included a copy of the NOF and the time extension, a response to the NOF declining to readvertise and signed in the name of the Employer, copies of the May 24, 1994, advertisement and the Notice of Job Availability it posted, a letter presenting a forensic opinion in support of employer's response, and an affidavit of posting.

The Employer's response asserted that it had conducted interviews with U. S. workers who had applied, whom it rejected solely for job related reasons. In addition, Employer contended that its title of the position, "Shipping & Transport Feasibility Consultant," was not misleading, as found by the CO, citing the forensic opinion it attached to its rebuttal and asserting that this title was appropriate and correct in the context of the job duties stated in the application. It contended further that the use of the DOT titles "Economist," "Economic Analyst," or "Financial Economist" instead would not be accurate and would be confusing and misleading. Finally, the Employer argued that its letter was not an additional hurdle barring the way of applicants to this job.

Final Determination. By the Final Determination (FD) the CO denied certification on May 10, 1995. AF 13-14. After the CO considered the Application, the NOF, and Employer's Rebuttal, the CO found that Employer's Rebuttal did not present convincing proof that the Employer had conducted a good faith recruiting effort or that this job was "clearly open" to any qualified U. S. worker.

The CO concluded that the Employer's use of the job title, "Shipping & Transport Feasibility Consultant," rather than the DOT titles, "Economist," "Economic Analyst," or "Financial Economist" in recruiting for the position was incorrect. Noting that the Employer failed to question the finding of the Job Service of Florida, which corrected this position title to conform to the DOT classification based on job duties at the time of application, the CO denied certification because the Employer elected not to readvertise the position using the correct title.

Secondly, the CO denied certification on grounds that the Employer's demand that the U. S. workers bring with them to any job interview (1) documentation that they were lawfully permitted to work in the U. S., (2) a certified copy of their university academic transcript, and (3) detailed letters of reference from previous employers with regard to any industry job that was related to the position offered in order to provide verification of their availability and qualifications. As these demands were excessive and unreasonable, the CO concluded that the Employer's recruitment effort was not bona fide and the Employer's rebuttal

was unpersuasive. The CO then denied certification for all of these reasons.

Discussion. The regulations at 20 CFR §§ 656.20(c)(8), 656.21(b)(7), and 656.24(b)(1) and (2)(ii) required the Employer to exercise good faith in addressing the availability and the qualifications of U. S. candidates who applied and were referred for the job at issue in this proceeding. In the absence of further evidence to the contrary, the Employer's rejection of the U. S. applicants in favor of the Alien could not be regarded as arising from lawful job-related reasons.

(1) First, the CO's classification of the position as "Economist," "Economic Analyst," or "Financial Economist," instead of the Employer's title, "Shipping & Transport Feasibility Consultant," required examination of the DOT, Employer's application, and the Employer's arguments in response to the NOF.

The meaning of Employer's argument is found in the forensic opinion it offered as documentation in support of its position that the duties to be performed by an Economist or Economic Analyst or Financial Economist are a "generic and general description of a typical position in economics." By contrast, continued that opinion, the duties of the job under the title used by the Employer are "quite specific and particular in nature, describing a specialized position oriented to analysis of statistical and financial data, gained through financial and econometric sampling techniques, of the economic and financial stability of individual countries in a quite localized geographic region of the world." AF 43. By offering this opinion as expert evidence in favor of its own position, the Employer conceded that the work to be performed in the position it offers is encompassed by the list of duties more broadly described in Classification No. 050.067-010, as quoted in the footnote above. The sole point of divergence, in other words is the more elaborate statement of the job duties in Employer's application and nothing more. While the DOT is not applied mechanically, it serves as a guideline to the nature and content of the position in question. **Trilectron Industries, Inc.**, 90-INA-188(Dec. 19, 1991) and 90-INA-176(Dec. 19, 1991).

In this case the DOT job classification clearly encompassed the job the Employer's application seeks to fill. Based on the Employer's application for certification, its evidence in rebuttal, and the position description in DOT Classification No. 050.067-010, it is concluded that the CO correctly found that Employer's description of this position was not appropriate in the context of this application, and that its advertisements of the job were misleading.

(2) The CO rejected the Employer's assertion that its recruitment effort was conducted in good faith because of the Employer's letter requiring that the U. S. workers to produce certified records that it intended to use in the verification of qualifications at each of the job interviews.

As the Employer did not suggest that any U. S. worker was not qualified, its representation that it was investigating the candidates to whom it sent requests for further details implies that those candidates met its major job requirements. **Gorchev & Graphic Design**, 89-INA-118(Nov. 29, 1990(en banc); and see **Dearborn Public Schools**, 91-INA-222(Dec. 7, 1993)(en banc).⁵ The CO concluded, however, that Employer's letter demanding the documentation of qualifications as a prerequisite to the job interview had a chilling effect that tended to discourage the U. S. applicants. As a result this process, itself, had a material impact on recruitment under the Act and regulations. While BALCA has held in **Bobco Metals Company**, 92-INA-372 (May 18, 1994), that written inquiries may be used, the Employer is not permitted to use this as a device to place unnecessary burdens on the recruitment process under **Lin and Associates**, 88-INA-007(Apr. 4, 1989) (en banc), or otherwise to have the effect of discouraging U. S. applicants. **Vermillion Enterprises**. 89-INA-043(Nov. 20, 1989).⁶

Summary. This case presents facts and issues that parallel the record in **Rysan, Inc.**, 94-INA-606 (Sept. 12, 1995), where an employer advertised for a "Profitability Maintenance Specialist" although the CO found that the correct job title was "Economist," a deviation that had a chilling effect on employer's recruitment effort. In that case the panel did not address the issue of the job title because it found that employer's request for excessive documentation had discouraged applicants from pursuing the job offer, which demonstrated the lack of good faith recruitment. As

⁵The Employer has the burden of proof on issues as to whether or not its rejection of U. S. workers was lawful. **Cathay Carpet Mill, Inc.**, 87-INA-161(Dec. 7, 1988)(en banc).

⁶Examination of that letter reveals further action that was not consistent with the hiring process. After its lengthy recital of documents and alternative documentation to be presented as evidence that the job applicant had the right to work in the United States, the Employer then said, "If you are hired, based on the presentation of the above-mentioned documents, and any of these documents are not authentic, you may incur liability for perjury. If you are hired, based on the presentation of the above-mentioned documents, and the corporation is audited by the United States Department of Labor or the United States Immigration and Naturalization Service, due to any false statements or use of false documents on your part, you can be prosecuted by the United States Attorney General's Office." AF 74-75. The Employer's use of the quoted language as a pre-condition for its interviews with U. S. workers was inappropriate. The Immigration and Nationality Act of 1986 did not authorize this use of its provisions to intimidate the U. S. workers who apply for jobs under the terms of § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), as amended, in the implementation of these regulations governing the certification of foreign workers to immigrate under an exception to the Act. **Oriental Healing Arts Institute**, 93-INA-075(Sept. 26, 1994).

in the instant case, the employer in **Rysan** required that at the time of the interview the U. S. applicants present the same documentation that this Employer has required of U. S. workers who answered this job advertisement, despite the creative job title that it used in place of "Economist." Because we conclude for these reasons that the CO correctly found that Air Tiger Express (Florida), Inc., has failed to demonstrate that it made a good faith effort to recruit U. S. workers, we affirm the denial of certification by the CO. **H. C. LaMarch Ent. Inc.**, 87-INA-607 (Oct. 27, 1988).⁷

Accordingly, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

I concur in the result.

JOHN C. HOLMES
Administrative Law Judge

⁷The Employer has the burden of proof on issues as to whether or not its rejection of U. S. workers was lawful. **Cathay Carpet Mill, Inc.**, 87-INA-161 (Dec. 7, 1988) (en banc).

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

AIR TIGER EXPRESS (FLORIDA) INC., Employer
CHEN SUN, Alien

CASE NO: 95-INA-514

PLEASE INITIAL THE APPROPRIATE BOX.

	:	:	:	:
	:	CONCUR	:	DISSENT
	:	:	:	COMMENT
	:	:	:	:
Holmes	:	:	:	:
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Huddleston	:	:	:	:
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Thank you,

Judge Neusner

Date: March 19, 1997